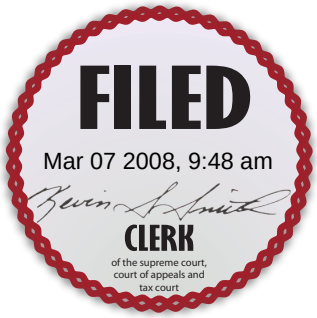

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 65A04-0707-CR-391
	)	
JOHN J. MURPHY,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0612-FB-83

March 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The State brings this appeal pursuant to Indiana Code Section 35-38-4-2(5) following the trial court's grant of John J. Murphy's Motion to Suppress Evidence.[1] The State raises a single issue for our review, namely, whether the trial court erred in granting Murphy's motion.

We affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of December 20, 2006, Deputy Thomas Latham of the Posey County Sheriff's Department filed an affidavit ("Affidavit") in support of a search warrant request for "1110 East Copperline Road" in Mount Vernon. Appellant's App. at 11. The Affidavit provided the following factual basis for that request:

> 1. Your affiant states he is a deputy with the Posey County Sheriff's Department and that he participated in the investigation described in this affidavit.
>
> 2. On December 19, 2006, I was traveling on West Copperline Road during regular patrol when I observed a red Ford pick-up truck parked on the roadway. It had no lights on and it was not running. I observed lights on at the residence at 1110 West Copperline Road. The vehicle was parked directly in front of the residence. The vehicle was blocking one lane of the roadway. I ran the plates on the vehicle and pulled into the driveway to wait on the return. At that time one of the garage doors opened and I saw two white males exit toward the roadway. I recognized John Murphy. I saw in the garage through the open doorway a drinking cooler sitting inside of a plastic bag. I identified the other individual to be Dirk Eickhoff.
>
> 3. Eickhoff stated that he had hit a deer and had come to the residence waiting for a ride. I had in fact been called to a nearby location

[1] "[T]he State's initiation of [an] appeal [under Indiana Code Section 35-38-4-2(5)] constitutes a judicial admission that prosecution cannot proceed without the suppressed evidence. Thus, if the trial court's order of suppression is affirmed on appeal, the State is precluded from further prosecution in that cause." State v. Lucas, 859 N.E.2d 1244, 1247 n.1 (Ind. Ct. App. 2007) (quoting State v. Aynes, 715 N.E.2d 945, 948 (Ind. Ct. App. 1999)), trans. denied.

> for a permit to put down an injured deer. I placed both individuals in restraints. I was the only officer at the residence. I advised Murphy that based on my training and experience and knowledge of Murphy and Eickhoff, I confronted them about what was in the drink cooler. Murphy stated to me, after being advised of his Miranda rights, that he had found the drink cooler in the road earlier in the day. He stated that he believed the cooler had been left in the road by Jeff Reagan who was going to try to frame Murphy or Peerman. The residence according to Murphy is the residence of Mike Peerman. Murphy and his girlfriend had been staying there. Murphy stated that he believed the container held anhydrous ammonia.
>
> 4. I asked Murphy, after advisement of his Pirtle rights, to be able to search the cooler. Murphy gave permission to search the cooler. I entered the garage and seized the cooler. Without opening the cooler, I performed a draeger test around the seal. The draeger tested positive for anhydrous ammonia.
>
> 5. That your affiant has been a deputy for five years and that he has received training in the investigations of methamphetamine labs . . . . Your affiant further states that he has been involved in the investigation of over 175 methamphetamine labs. . . . Anhydrous ammonia is a farm fertilizer. It is a necessary ingredient for the manufacture of methamphetamine using the Nazi method. Anhydrous ammonia has no other legitimate uses other than as a farm chemical. It is highly toxic in nature and requires air tight containers with markings. . . .

Id. at 11-12. The Affidavit described the property to be searched as "[t]he garage at 1110 East Copperline Road, Mt. Vernon," and the items to be searched for as "instrumentalities and/or evidence of the dealing, possession, manufacturing and use of methamphetamine" and "methamphetamine." Id. at 11. That same day, the trial court granted the search warrant request for "1110 East Copperline Road, Mt. Vernon." Id. at 10.

In executing the search warrant for the garage at 1110 East Copperline Road, Deputy Latham discovered approximately forty-one items "commonly used to manufacture methamphetamine." Transcript at 13; Appellant's App. at 17. About

midway through the search, a man arrived at the location and identified himself to Deputy Jeremy Fortune as the stepfather of Michael Peerman, the residence's owner. Deputy Fortune informed Peerman's stepfather of the search, and the stepfather used his cell phone to call Peerman. Deputy Fortune then spoke with Peerman, and Peerman "told [Deputy Fortune] to go . . . into the house to look and see if anybody was there." Transcript at 37. Peerman then stated that "if you find anything in there, it is not mine." Id. Peerman's stepfather let Deputy Fortune inside the residence, and "in a back bedroom," "sitting on top of the bed in plain . . . view," Deputy Fortune discovered "an aerosol can with a false bottom . . . and . . . several [b]aggies . . . with white residue in them." Id. at 37-38. Deputy Fortune believed the white residue was methamphetamine.

After searching the residence, Deputy Fortune had the pickup truck impounded. Deputy Latham believed the vehicle to be inoperable, and the vehicle was blocking the westbound lane of travel of Copperline Road. An inventory search was conducted "according to . . . standard operating procedures," and an HCL generator was found in the toolbox. Id. at 39.

On December 21, the State charged Murphy as follows: Dealing in Methamphetamine, as a Class B felony; Possession of Chemical Reagents or Precursors with Intent to Manufacture a Controlled Substance, as a Class D felony; Illegal Possession of Anhydrous Ammonia or Ammonia Solution, as a Class D felony; and Storage or Transportation of Anhydrous Ammonia Illegally, a Class A misdemeanor. On June 11, 2007, Murphy filed his motion to suppress the evidence, which the court generally granted after a hearing. This appeal ensued.

DISCUSSION AND DECISION

The State contends that the trial court erred when it determined that the evidence seized from Peerman's garage pursuant to the search warrant, along with the evidence seized from the residence and truck, must be suppressed. Generally, we review a trial court's decision to grant a motion to suppress as a matter of sufficiency. State v. Lucas, 859 N.E.2d 1244, 1248 (Ind. Ct. App. 2007) (citing Moriarity v. State, 832 N.E.2d 555, 557-58 (Ind. Ct. App. 2005)), trans. denied. When conducting such a review, we will not reweigh evidence or judge witness credibility. Id. Here, the State appeals from a negative judgment and must show that the trial court's ruling on the suppression motion was contrary to law. Id. This court will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court. Id.

The Garage

The State first asserts that the evidence seized from Peerman's garage was seized pursuant to a search warrant supported by probable cause. The federal and state constitutions, along with the Indiana Code, guarantee that a court will not issue a search warrant without probable cause. Overstreet v. State, 783 N.E.2d 1140, 1157 (Ind. 2003) (citing U.S. Const. amend IV; Ind. Const. art. I, § 11), cert. denied, 540 U.S. 1150 (2004); see Ind. Code § 35-33-5-1 (2006). To obtain a warrant, the State must file with the court an affidavit that describes the place to be searched, the unlawful items to be searched for, and the facts that constitute probable cause. I.C. § 35-33-5-2. The decision to issue the warrant should be based on the facts stated in the supporting affidavit and the rational and

reasonable inferences drawn therefrom. Leicht v. State, 798 N.E.2d 204, 207 (Ind. Ct. App. 2003), trans. denied.

We review the court's decision to issue a warrant as follows:

> "In deciding whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of the reviewing court is to determine whether the magistrate had a 'substantial basis' for concluding that probable cause existed. Substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. 'Reviewing court' for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing the decision."

Love v. State, 842 N.E.2d 420, 425-26 (Ind. Ct. App. 2006) (quoting Merritt v. State, 803 N.E.2d 257, 260 (Ind. Ct. App. 2004)) (omission original).

Here, the Affidavit filed with the State's request for the warrant demonstrated "a fair probability that contraband or evidence of a crime will be found in a particular place." See id. Specifically, Deputy Latham testified that he had discovered in the garage[2] a cooler that field-tested positive for anhydrous ammonia. Deputy Latham then recounted his training and experience in methamphetamine investigations, and he testified that anhydrous ammonia "is a necessary ingredient for the manufacture of methamphetamine . . . [and] has no . . . legitimate uses other than as a farm chemical." Appellant's App. at 12. Those facts were sufficient for the issuing judge to reach the "commonsense decision" that there was "a fair probability" that the "instrumentalities

[2] Murphy does not contest the validity of Deputy Latham's entry into the garage and search of the cooler, which occurred after Deputy Latham observed the cooler in plain view and Murphy told Deputy Latham that the cooler contained anhydrous ammonia.

and/or evidence of the dealing, possession, manufacturing and use of methamphetamine" or methamphetamine itself would be found in that same garage. See Love, 842 N.E.2d at 425-26; Appellant's App. at 11. As such, the search warrant was supported by adequate probable cause.

Murphy argues, in support of the trial court's decision on review, that the Affidavit is "deficient" because Deputy Latham, in paragraph two of the Affidavit, twice references "West Copperline Road" rather than "East Copperline Road." See Appellee's Brief at 8; Appellant's App. at 11. But the Affidavit is styled as regarding "1110 East Copperline Road," and the description of the place to be searched gives the address as "1110 East Copperline Road." Appellant's App. at 11. Further, Deputy Latham testified that he had just been at the relevant location, even though he gave an incorrect address in part of the Affidavit. It is apparent from the totality of the evidence that a substantial basis existed for the issuance of the warrant for 1110 East Copperline Road. Cf. Houser v. State, 678 N.E.2d 95, 100-01 (Ind. 1997) ("By all appearances the error [of the wrong address] was an innocent one and did not affect the probable cause determination. Under these circumstances reversal is not required.").[3]

The House

The State next contends that Deputy Fortune searched Peerman's residence pursuant to an exception to the warrant requirement. Specifically, the State asserts that Peerman consented to the search of his home. Accordingly, the State continues, the evidence seized from Peerman's home is admissible against Murphy. There is no dispute

[3] Murphy does not challenge that the Affidavit particularly described the place to be searched. Rather, he asserts only that the Affidavit "contains no information or evidence showing probable cause to believe any evidence of a crime . . . at 1110 East Copperline Road." Appellee's Brief at 9.

that Peerman both owned the residence and that Peerman gave Deputy Fortune consent to search the residence "to make sure nobody was hiding in the house."[4] Transcript at 27. Nonetheless, Murphy argues that Peerman had no authority to consent to the search of the back bedroom of the residence, in which Murphy resided, and that Deputy Fortune's search exceeded the scope of the consent Peerman was entitled to give. We address each argument in turn.

Warrantless searches based on lawful consent are not unreasonable. Lee v. State, 849 N.E.2d 602, 605 (Ind. 2006) (citing Illinois v. Rodriguez, 497 U.S. 177 (1990)). Our Supreme Court has discussed third-party consent as follows:

> It is well established that a third party may consent to a search of another's premises or property if actual authority exists. Rodriguez, 497 U.S. at 179; United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). Actual authority does not turn solely on whatever property interest the third party may have in the property. It can arise from "mutual use of the property by persons generally having joint access or control for most purposes." Matlock, 415 U.S. at 171. This is explained on the ground that the consenting party could permit the search "in his own right" and also that the defendant "assumed the risk" that a co-occupant might permit a search. Id. See also 1 [Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.8(b), p. 237 (3d ed. 1995)] ("when one subjects her property to the joint or exclusive control of another, she has thereby assumed the risk that the other person will turn that property over to the police and allow the police to examine it further.").

Id. at 606.

At the evidentiary hearing, Peerman testified as follows:

> Q. [by the State] Okay. Was anybody . . . living with you there on December 19th?

[4] Murphy argues that Deputy Fortune did not know for certain whether it was actually Peerman on the cell phone giving consent to search the residence. But Peerman corroborated Deputy Fortune's testimony. As such, whether Deputy Fortune did all he could at the time to confirm Peerman's identity is irrelevant to the fact that Peerman gave his consent to search the residence.

A. A friend of mine was staying with me, but he wasn't actually . . . he didn't have a key to the home. I mean, I am just unsure what you mean by living. I mean, he had a room that he had things in and stuff, but he did not have a key to the house to come and go as he wished. It was just as I was there only.

Q. And who was that?

A. John Murphy.

Q. So he was not allowed to be there if you were gone?

A. Not in the house, because I wouldn't be there to let him in.

* * *

Q. How long had Mr. Murphy been staying with you?

A. Just for a couple of weeks.

Q. And he had his own bedroom?

A. Yeah, he had a room that he kept things in, I mean, yeah.

Q. Did it have a bed in it?

A. Yup, yes.

Q. Were you allowed access to that room?

A. Yes.

Q. So, he didn't keep it locked so you couldn't get in it or anything like that?

A. I don't even think there is a lock. . . . [N]o, it is just a regular bedroom door, no lock.

Q. And had you been . . . in that room recently?

A. No.

Q. How long had it been since you had been in that room?

A. I didn't go in there the whole time he was there. . . .

Q. Was there anything preventing you from going in the room?

A. No.

Transcript at 23-26. In light of that testimony, it is clear that Peerman had "joint access or control" to the back bedroom, even though Peerman occasionally permitted Murphy to spend the night in that room. See Lee, 849 N.E.2d at 606-10. Hence, Peerman had actual authority over that room, and Deputy Fortune's search of that room pursuant to Peerman's consent was valid.

Murphy also argues that Deputy Fortune exceeded the scope of Peerman's consent "to make sure nobody was hiding in the house." Transcript at 27. Specifically, Murphy asserts that "[t]he search of the house by police and seizure of items from the house greatly exceeded the limits of the consent given by Peerman." Murphy's argument is without cogent reasoning and is therefore waived. See Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, Deputy Fortune testified that he discovered the aerosol can and baggies in that room when he entered it and saw the items "sitting on top of the bed in plain . . . view." Id. at 37-38. "The plain view doctrine allows a police officer to seize items when he inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location." Jones v. State, 783 N.E.2d 1132, 1137 (Ind. 2003). Accordingly, those items were properly seized.[5]

[5] It is not clear from the record or briefs when Deputy Fortune seized those items. Nonetheless, Murphy does not assert error in the timing of the seizure. Accordingly, we do not address it.

The Ford Ranger

Finally, the State contends that the trial court erred in suppressing the evidence seized from the truck. The State maintains that that evidence was seized pursuant to a proper inventory search following impoundment. One exception to the warrant requirement is an inventory search of an impounded vehicle. Ratliff v. State, 770 N.E.2d 807, 809 (Ind. 2002).

In determining the propriety of an inventory search, the threshold question is whether the impoundment itself was proper. Id. An impoundment is warranted when it is part of "routine administrative caretaking functions" of the police or when it is authorized by state statute.[6] Id. To show that the inventory search was part of the community caretaking function, the State must demonstrate that its belief—that the vehicle posed some threat or harm to the community, or was itself imperiled—was consistent with objective standards of sound policing. See id. at 809-10 (quoting Woodford v. State, 752 N.E.2d 1278, 1281 (Ind. 2001)). Further, the State must show that the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation. Id. at 810 (quoting Woodford, 752 N.E.2d at 1281). However, the State must present more than conclusory testimony of an officer that the search was conducted as a routine inventory. Edwards v. State, 762 N.E.2d 128, 133 (Ind. Ct. App. 2002), aff'd on reh'g, 768 N.E.2d 506 (Ind. Ct. App. 2002), trans. denied.

Here, we need not address whether the impoundment of the truck was proper. Assuming it was, the State must then show that the impoundment was in accordance

[6] The State concedes that the impoundment here was not authorized by statute.

"with established departmental routine or regulation." Ratliff, 770 N.E.2d at 810; see Edwards, 762 N.E.2d at 133. But the State's only evidence that the inventory search of the truck was in conformity with local police policy was the conclusory testimony of Deputy Latham and Deputy Fortune. Again, to show that its actions come within the inventory exception, "the State must do more than offer the bald allegation of law enforcement that the search was conducted as a routine inventory." Edwards, 762 N.E.2d at 133. Where, as here, "the record does not include the substance of any police department policy regarding inventory searches, or even indicate there is such a policy," the State fails to carry its burden. See id. The trial court here had no evidentiary basis to evaluate whether the inventory search performed on the truck was in conformity with established local law enforcement policy. Accordingly, the court's decision to suppress the evidence seized from the truck must be affirmed.

Conclusion

In sum, the trial court erred in suppressing the evidence seized from the garage and residence at 1110 East Copperline Road. The State acted pursuant to a valid search warrant supported by probable cause when it seized evidence from the garage. And the State lawfully seized evidence from within the residence after having been granted consent to search the residence by its owner, Peerman. However, the State failed to satisfy its burden to prove that the evidence seized from the truck was in accordance with established local policy. As such, we affirm only that part of the trial court's order.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and CRONE, J., concur.